

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTONDAVID LAWRENCE WEIRICH,
Plaintiff,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Defendant.

NO. CV-10-5031-EFS

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

Before the Court, without oral argument, is Defendant Board of Governors of the Federal Reserve System's ("the Board") Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF No. [9](#)), filed August 26, 2010. In its November 2, 2010 Order, the Court held the Board's motion in abeyance, requiring the Board to file written argument demonstrating why, given the Board's apparent non-compliance with the FOIA's statutory time requirements, the case should be dismissed for lack of subject-matter jurisdiction. Having reviewed the supplemental materials and relevant authority, the Court is fully informed. For the reasons set forth below, the Court grants the Board's motion.

I. Background

In August 2008 and during the global economic crisis, Plaintiff David Weirich sent three emails to the Board under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 seeking information on the Board's

1 involvement in extending loans to a number of businesses and industries,
2 including several of the world's largest investment banks.

3 On August 2, 2009, Mr. Weirich sent an email to the Board's Freedom
4 of Information Office ("FOI Office") seeking:

5 any documents of meetings held by, or discussions between, any
6 members of the Federal Reserve concerning why emergency funds
7 were given to commercial banks which were nearly insolvent,
8 instead of requesting the FDIC to intervene near the point of
9 insolvency, as required by Section 11 of the Federal Deposit
10 Insurance Act.

11 (ECF No. 10-1, Ex. A.) On August 4, 2009, the FOI Office acknowledged
12 Mr. Weirich's letter, *id.* Ex. B, and on September 1, 2009, sent an
13 extension letter in accordance with FOIA § 552(a)(6)(B)(i), informing Mr.
14 Weirich that an additional ten days would be required to respond, *id.* Ex.
15 C.

16 On September 15, 2009, Mr. Weirich sent a second email to the FOI
17 Office seeking:

18 (a) Federal Reserve standards pertaining to the extension of
19 credit in real estate loans by member banks. Per 12 U.S.C.
20 section 1828(o)(2)(A)(i), Federal banking agencies shall
21 consider 'the risk posed to the Deposit Insurance Fund by such
22 extensions of credit;'

23 (b) Federal Reserve standards of member banks in purchasing
24 real estate loans from other banks, savings associations or any
25 other financial institutions. This is one of the key issues
26 in the 'toxic asset' problem, where member banks purchase the
loans of other banks and receive the loan proceeds. Once
member banks have purchased such real estate loans, this is
essentially the same as the member banks extending the credit
initially (since the banks receive the proceeds of the real
estate loans following the purchase), and such purchases should
therefore be regulated in the same manner as extension of
credit is regulated per 12 U.S.C. section 1828(o)(2)(A)(i);

(c) Where in U.S. Code the Federal Reserve is tasked with
maintaining a market for the purchase and sale of real estate
loans. Although member banks are authorized to purchase and
sell real estate loans, I fail to see in the code where the
Federal Reserve is given authority to maintain and/or subsidize
such market in the event of a downturn in such market; and

1 (d) Any meetings of any members of the Federal Reserve
2 regarding regulating the purchase and sale of real estate loans
3 by member banks. Although such purchase and sale is permitted
4 under Title 12, it is curious that a member bank should want
5 to sell its loans unless the bank has a short-term liquidity
6 problem; after all, should not the primary business of banks
7 be in providing deposits and managing loans, not in selling
8 loans for profit?

9 *Id.* Ex. E. On September 16, 2009, the FOI Office acknowledged Mr.
10 Weirich's letter, *id.* Ex. F, and on October 14, 2009, sent a ten-day
11 extension letter, *id.* Ex. G.

12 On November 2, 2009, Mr. Weirich sent a third email seeking:

13 [a]ny documents showing any discussion/debate any member of the
14 Federal Reserve may have had from August 2008 onward concerning
15 whether or not it was appropriate for the Federal Reserve to
16 bail out firms such as AIG and JP Morgan/Bear Stearns, instead
17 of allowing such firms to settle their troubles in Chapter 11
18 bankruptcy.

19 *Id.* Ex. I. On November 10, 2009, the FOI Office acknowledged Mr.
20 Weirich's letter, *id.* Ex. J, and on December 2, 2009, sent a ten-day
21 extension letter, *id.* Ex. G.

22 After reviewing Mr. Weirich's requests and consulting with staff,
23 the FOI Office concluded that, with the exception of items (a) and (b)
24 of Mr. Weirich's September 15, 2009 request, Mr. Weirich's requests were
25 not specific enough to allow staff to process them without unduly
26 burdening or significantly interfering with the Board's operations. *Id.*
Exs. D, H, L.

27 In the meantime, Mr. Weirich filed this action, seeking a Court
28 order requiring the Board to respond to his FOIA requests. (ECF No. [1](#).)
29 In his March 23, 2010 Complaint, Mr. Weirich alleges that the Board's
30 failure to respond to his requests within the ten-day extension period
31 violated 5 U.S.C. § 552 and 12 C.F.R. § 261. He further claims that he:

1 1) telephoned the FOI Office to receive an update on his FOIA requests,
2 2) informed the Office of Inspector General of the Board's failure to
3 comply, and (3) requested assistance from Senator Maria Cantwell. *Id.*
4 at 3.

5 But it was not until after the ten-day extensions had expired that
6 the Board finally responded. By three letters dated April 20, 2010, the
7 Board sought clarification on Mr. Weirich's August 2 and November 2, 2009
8 requests. It also responded to items (a) and (b) of his September 15,
9 2009 request,¹ noted that (c) was not a proper FOIA request, and sought
10 clarification on (d). *Id.* Ex. D, H, L. In each of these letters, the
11 Board advised Mr. Weirich that a FOIA request "must reasonably describe
12 the records in a way that enables the Board's staff to identify and
13 produce the records with reasonable effort and without unduly burdening
14 or significantly interfering with any of the board's operations," and
15 that Mr. Weirich's request, as written, was too vague to process. *Id.*
16 The letters asked Mr. Weirich to revise his requests by May 18, 2010, or
17 they would be closed. *Id.* Mr. Weirich did not respond to the Board's
18 requests for clarification, and the FOI Office administratively closed
19 all three of Mr. Weirich's requests.

20 II. Discussion

21
22 ¹ In responding to items (a) and (b), the Board by identified
23 twenty-eight (28) references to websites providing information on
24 "Federal Reserve standards pertaining to extension of credit in real
25 estate loans by member banks" and "Federal Reserve standards of member
26 banks in purchasing real estate loans from other banks, savings
associations or any other financial institutions." *Id.* Ex. H.

1 The Board moves under Federal Rule of Civil Procedure 12(b)(1) to
2 dismiss the action for lack of subject-matter jurisdiction because Mr.
3 Weirich failed to exhaust his administrative remedies. Mr. Weirich did
4 not respond.² Because the Court finds Mr. Weirich failed to exhaust his
5 administrative remedies, the Board's motion is granted.

6 The plaintiff bears the burden of proving the existence of subject-
7 matter jurisdiction. *Stock West, Inc. V. Confederated Tribes*, 873 F.2d
8 1221, 1225 (9th Cir. 1989). When considering a motion to dismiss
9 pursuant to Federal Rule of Civil Procedure 12(b)(1),³ courts may rely

11 ² Failure to respond constitutes consent to an adverse order. LR
12 7.1(e).

13 ³ Under Rule 12(b)(1), the defense of lack of subject-matter
14 jurisdiction must be asserted either by answer or by motion. If by
15 motion, Rule 12(b) states that such a motion "must be made *before*
16 *pleading* if a responsive pleading is allowed." Fed. R. Civ. P. 12(b)
17 (emphasis added). In this case, the Board filed its Rule 12(b)(1) motion
18 to dismiss *after* asserting the affirmative defense of lack of subject-
19 matter jurisdiction in its Answer (ECF No. 7).

21 Courts are split as to whether a Rule 12(b)(1) motion, which is
22 commonly referred to as a "pre-answer" motion, is the proper procedural
23 vehicle for attacking subject-matter jurisdiction *after* an answer has
24 been filed. Several courts have allowed post-answer motions to dismiss
25 based on grounds asserted as defenses in the answer. *See Telesca v. Long*
26 *Island Hous. P'ship*, 443 F. Supp. 2d 397, 405 (E.D.N.Y. 2006); *Molnlycke*
Health Care AB v. Dumex Med. Surgical Prods. Ltd., 64 F. Supp. 2d 448,
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1 upon declarations or other evidence and "resolve factual disputes where
2 necessary." *Id.* (quoting *Augustine*, 704 F.2d at 1077). And although
3 normally "[n]o presumptive truthfulness attaches to the plaintiff's
4 allegations," *id.*, if the motion is resolved on declarations alone and
5 without an evidentiary hearing, the complaint's factual allegations must
6 be accepted as true. *McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir.
7 2001). But "[a] court is required to convert a Rule 12(b)(1) motion to
8 dismiss into a Rule 12(b)(6) motion or Rule 56 summary judgment motion
9 when resolution of the jurisdictional question is intertwined with the
10 merits of the case." *Islands, Inc. v. U.S. Bur. of Reclamation*, 64 F.
11 Supp. 2d 966, 968 (E.D. Cal. 1999), *vacated on other grounds*, 2001 WL
12 503478 (9th Cir. 2001).

13 Here, the Board's motion to dismiss the FOIA claims involves
14 jurisdictional questions that are intertwined with the merits. Yet,
15 these questions do not involve resolution of factual questions going to
16 the merits and thus the motion need not be treated as a summary judgment
17 motion. See *Sun Valley Gasoline, Inc. v. Ernst Enters., Inc.*, 711 F.2d
18 138, 139 (9th Cir. 1983).

19 Under the FOIA, the district court "has jurisdiction to enjoin the
20 agency from withholding agency records and to order the production of any

21 _____
22 449 n.1 (E.D. Pa. 1999). Other courts insist that post-answer Rule 12(b)
23 motions to dismiss are untimely. See *Augustine v. United States*, 704
24 F.2d 1074, 1075 n.3 (9th Cir. 1983); *Byrne v. Nezhat*, 261 F.3d 1075, 1093
25 n.35 (11th Cir. 2001). Here, the Court recognizes that the Board's
26 motion is "properly before the court as a Rule 12(h)(3) suggestion of
lack of subject matter jurisdiction." *Augustine*, 704 F.2d at 1075 n.3.

1 agency records improperly withheld from the complainant." 5 U.S.C. §
2 552(a)(4)(B). But before a party can seek judicial review, it must
3 exhaust its administrative remedies under the FOIA. *In re Steele*, 799
4 F.2d 461, 465 (9th Cir. 1986). If it does not, the district court lacks
5 subject-matter jurisdiction over the FOIA lawsuit. *Id.* at 466; *see also*
6 *Hymen v. Merit Sys. Prot. Bd.*, 799 F.2d 1421, 1423 (9th Cir. 1986),
7 *overruled on other grounds by, Cooper v. U.S. Postal Serv.*, 740 F.2d 714
8 (9th Cir. 1984), *cert. denied*, 471 U.S. 1022, 105 (1985) (finding "[t]he
9 district court . . . properly dismissed the FOIA claims for lack of
10 subject matter jurisdiction" where the requester failed to exhaust). A
11 requester fails to exhaust her administrative remedies if he submits an
12 improper FOIA request. *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263
13 (9th Cir. 1978).

14 The Board alleges that Mr. Weirich's request was improper and, thus,
15 he failed to exhaust his administrative remedies thereby depriving this
16 Court of subject-matter jurisdiction over his FOIA claim. A proper FOIA
17 request must "reasonably describe[]" the records sought and must be "made
18 in accordance with published rules stating the time, place, fees (if any)
19 and procedures to be followed" 5 U.S.C. § 552(a)(3)(A). The
20 Board's regulations similarly require requests to "reasonably describe
21 the records in a way that enables the Board's staff to identify and
22 produce the records with reasonable effort and without unduly burdening
23 or significantly interfering with any of the Board's operations." 12
24 C.F.R. § 261.12(b). Those regulations also provide: "The Board need not
25 accept or process a request that does not reasonably describe the records
26 requested or that does not otherwise comply with the requirements of this

1 section. The Board may return a defective request, specifying the
2 deficiency." *Id.*

3 Here, Mr. Weirich's August 2, 2009 and November 2, 2009 requests and
4 items (c) and (d) of his September 15, 2009 request do not reasonably
5 describe the records sought. The August 2, 2009 request seeks "any
6 documents of meetings held by, or discussions between, any members of the
7 Federal Reserve concerning why emergency funds were given to commercial
8 banks which were nearly insolvent, instead of requesting the FDIC to
9 intervene near the point of insolvency." (ECF No. 10-1, Ex. A.) Mr.
10 Weirich fails to reasonably describe the "documents" and "members" to
11 which he refers. Nor does he specify what is meant by "emergency funds"
12 and "commercial banks which were nearly insolvent." Without
13 clarification, the Board could not respond to Mr. Weirich's request
14 without producing thousands of documents, which would significantly
15 interfere with the Board's operations.

16 As to the September 15, 2009 request, the Board responded in full
17 to items (a) and (b) by sending Mr. Weirich a list of twenty-eight (28)
18 references to websites providing information on the resources sought. And
19 the remaining requests, items (c) and (d), were improper. Item (c) does
20 not seek FOIA documentation, but rather "poses a question about a
21 publicly available resource," which is not a proper FOIA request. *Id.*
22 at Ex. E; see *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985) ("the
23 [agency] has no duty [under FOIA] either to answer questions unrelated
24 to document requests or to create documents."). Item (d), which seeks
25 "[a]ny meetings of any members of the Federal Reserve regulating the
26 purchase and sale of real estate loans by member banks," lacks

1 specificity. Production of *all* documents pertaining to *all* meetings
2 between *all* members of the Board would be unduly burdensome. (ECF No.
3 10-1, Ex. E.)

4 Finally, Mr. Weirich's November 2, 2009 request for "[a]ny documents
5 showing any discussion/debate any member of the Federal reserve may have
6 had from August 2008 onward" concerning the Federal Reserve's bailout of
7 investment firms neither reasonably describes the records sought nor
8 allows the Board to respond to that request without producing thousands
9 of documents. Thus, not only do they lack specificity, but Mr. Weirich's
10 requests would unduly burden the FOI Office and significantly interfere
11 with the Board's operations.

12 After reviewing the Board's supplemental authority, the Court is
13 satisfied that Mr. Weirich has failed to exhaust his administrative
14 remedies even though the Board did not seek clarification from Mr.
15 Weirich until April 20, 2010, after Mr. Weirich had filed his lawsuit.
16 The statutory time limits for an agency's response are not triggered
17 until a *proper* FOIA request is received. *See Lewis v. U.S. Dep't of*
18 *Justice*, --- F. Supp. 2d ---, 2010 WL 3271283 (D.D.C. Aug. 19, 2010)
19 ("[A]n agency is under no obligation to respond until it has received a
20 proper FOIA request in compliance with its published regulations[.]"
21 (internal citations omitted) (citing *Thomas v. FCC*, 534 F. Supp. 2d 144,
22 146 (D.D.C. 2008))); *Latham v. U.S. Dep't of Justice*, 658 F. Supp. 2d
23 155, 157-58 (D.D.C. 2009) (dismissing for failure to exhaust where FOIA
24 request did not reasonably describe records sought even though "as of the
25 filing of this action, [plaintiff] had received no response from the
26 DEA").

1 Because the Court concludes that Mr. Weirich has not submitted a
2 proper FOIA request, the Board was under no obligation to adhere to the
3 statutory time requirements and Mr. Weirich failed to exhaust his
4 administrative remedies. And because Mr. Weirich did not timely respond
5 to the Board's motion or supplemental authority, the Court may assume he
6 consents to dismissal.⁴ LR 7.1(e). Accordingly, this case is dismissed
7 for lack of subject-matter jurisdiction.

8 IV. Conclusion

9 For the foregoing reasons, **IT IS HEREBY ORDERED:**

10 1. Defendant Board of Governors of the Federal Reserve System's
11 Motion to Dismiss for Lack of Subject Matter Jurisdiction (**ECF No. 9**) is
12 **GRANTED**. Plaintiffs' Complaint (**ECF No. 1**) is **DISMISSED** without
13 **prejudice**.

14 2. **Judgment** is to be entered in favor of Board of Governors of the
15 Federal Reserve System.

16 3. This file shall be **CLOSED**.

17 **IT IS SO ORDERED**. The District Court Executive is directed to enter
18 this Order and to distribute copies to Plaintiff and counsel.

19 **DATED** this 15th day of November 2010.

21 S/ Edward F. Shea

22 EDWARD F. SHEA

23 United States District Judge

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25 ⁴ On August 26, 2010, the Court notified Mr. Weirich, as a pro se
26 litigant, that his "failure to file a response [would] constitute [his]
consent to the Court, granting the motion." (ECF No. 12.)